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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

JENNIFER SHUK-HAN KWOK, as
Trustee, etc.,

Plaintiff and Respondent,

v.

JEANNE KWONG, as Trustee, etc.,

Defendant and Appellant;

AMY KWONG et al.,

Objectors and Appellants.

A147323

(City & County of San Francisco
Super. Ct. No. PES-09-293019)

INTRODUCTION

This is the third appeal arising out of an ongoing dispute among the parties over the estate of Stanley Kwong (Stan).¹ In the original action, *Kwong I*, Stan's mother Lau and his brother Larry sought an accounting of Stan's estate relying on Stan's financial records in the possession of Stan's surviving spouse Jennifer Shuk-Han Kwok (Kwok) and Stan's company California Financial Mortgage Corporation (California Financial). After the trial court issued a final judgment in *Kwong I*, Kwok filed a second complaint, *Kwong II*, alleging four causes of action against Stan's two surviving siblings, Larry and Jeanne, based on their alleged theft of Stan's financial records. The current action, *Kwong III*, arises out of a dispute between Kwok, the trustee of Stan's community property trust, and Stan's sister Jeanne, the trustee of Stan's separate property trust

¹ To avoid confusion, we refer to the other members of the Kwong family by their first names.

(separate property trust) along with her daughters. Kwok elected to disclaim assets that would have gone to the marital trust to essentially transfer the funds from the separate property trust to her children. By disclaiming the assets in the community property trust, those assets pass to the children's generation-skipping tax trust. The amount is not covered by the marital deduction, so the estate tax must be paid, which in turn eliminates the assets to fund the bypass trust. The disclaimer effectively disinherits Stan's four nieces—Larry's daughters Amy and Sara, and Jeanne's daughters Kimberly and Krista—who were included as beneficiaries of the bypass trust (the nieces).

The question before us is whether the disclaimer language could be used in this fashion. The trial court found that Kwok's disclaimer was a valid qualified disclaimer under both California and federal law. We agree. The trial court further found that the disclaimed assets should pass from the separate property trust to the generation-skipping tax trust using the federal estate tax exemption and thus eliminating the funding for the bypass trust. While we recognize Stan may not have intended the disclaimer to be used in this precise fashion, all parties agree his primary goal was to provide for his children, and Kwok's actions are consistent with his intent. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Trust Documents

Stan and Kwok married in 1998 and had two children. Stan was diagnosed with myelodysplastic syndrome in September 2008 and died in July 2009. Prior to his death, he created an estate plan leaving the bulk of his assets, an estate of approximately \$19 million, to Kwok and their two children.

Stan had two trusts: a community property trust with Kwok and a separate property trust. The community property trust was divided into the survivor's trust of approximately \$5.5 million where Kwok had her half of the community property and the marital trust of \$5.5 million where Kwok received Stan's half of their community property. Kwok had a life estate in Stan's half of the community property, with it going to their children upon her death. Upon Kwok's death, their children receive the assets of

the marital trust in the generation-skipping tax trust. Under the marital deduction, Kwok paid no estate tax on either half of the trust. Stan's separate property trust was valued at approximately \$6 million and included a bypass trust of approximately \$2.3 million, with Jeanne as trustee. The beneficiaries of the bypass trust were Stan's children and his four nieces. The two trusts were executed on the same day and constitute a single estate plan.

The separate property trust established the order in which the assets should be distributed. All Stan's debts must be paid and then a specific gift goes to the marital trust followed by funding of the bypass trust. The bypass trust shall be funded with "the largest fractional part of the trust estate (up to the whole thereof) that can pass free of federal estate tax by reason of the applicable exclusion amount." Any residuary goes to the marital trust.

The community property trust contains the following provision entitled "Disclaimer by Surviving Spouse" in section 5.9: "If the surviving spouse effectively disclaims any portion of his or her interest in a marital trust, the portion thereof so disclaimed shall be retained as a separate trust, to be held, administered and distributed in accordance with the provisions of article 6; provided, however, that the surviving spouse shall have no power of appointment over said separate trust."

On April 1, 2010, Kwok signed a disclaimer that stated: "The undersigned, Jennifer Kwok, in accordance with section 5.9 of the Stanley Kwong and Jennifer Kwok revocable trust dated April 6, 2009 (the 'Trust'), hereby irrevocably, and without qualification, disclaims and refuses to accept any and all right, title and interest in a pecuniary amount, which would otherwise be distributed to the marital trust for her benefit pursuant to the terms of section 5.4 of Trust, equal to the maximum amount (determined before giving effect to this disclaimer) that can be allocated to a gift transfer at Stanley Kwong's death that does not qualify for the federal estate tax marital or charitable deduction to any extent, without producing any federal estate tax"

Kwok also signed an "agreement" which explained that she had disclaimed her rights to the assets in the marital trust and under the terms of the trust, the disclaimed assets are added to the bypass trust. She then disclaimed her rights to the assets in the

bypass trust and as a result the assets go into the children's generation-skipping tax trust. The agreement states that the disclaimed assets are being segregated from the remaining assets in the trust "effective as of the date hereof." "The trustee believes that, as a result of transfers made during Stan's lifetime and upon Stan's death, the pecuniary amount of the disclaimed portion is \$2,203,895." "The segregation of the disclaimed assets . . . is effective as of the date hereof. While title of the assets shall be changed as soon as practicable in order to carry out this agreement, the segregation of property interests made herein and the effective dates thereof are intended to take precedence over the forms of title in which those interests are held."

Kwok listed the disclaimed assets as four properties in San Francisco: 630 16th Avenue, 834 16th Avenue, 2611 47th Avenue, and 3848 Fulton Street, with the associated bank accounts. She lists the total value of the properties as \$2,444,621 and the disclaimed amount as \$2,246,209 with \$198,412 "owed to trust."

On May 14, 2010, Kwok filed a "Petition for Order Directing Respondent Trustee to Distribute Separate Trust Assets to Trustee of the Marital Trust." Kwok argued she had "disclaimed" Stan's half of the community property left to her in the marital trust equal to the amount of the estate tax exemption that would be used by the bypass trust. If the property did not go to her, it would go into the generation-skipping tax trust, but the children are not entitled to the marital deduction from estate taxes so this would eliminate the funding of the bypass trust. The remaining assets would fall into the residuary clause and pass into the marital trust.

With the disclaimer, Kwok has a life estate in the value of Stan's separate property trust and because the disclaimed assets in the marital trust are replaced by properties of equal value, Kwok's net worth remained unchanged by the disclaimer. The children's assets in the generation-skipping tax trust are increased by the value of the property that would have been included in the bypass trust. The disclaimer, however, disinherits Stan's sister and his nieces entirely.

To date, Kwok has not transferred the disclaimed assets to the generation-skipping tax trust and the children's generation-skipping tax trust is not yet funded.

B. Evidence at Trial

Kwok testified about her and Stan's estate planning. She stated the main goal was to protect their young children. Kwok was concerned about Stan making Jeanne the trustee of the separate property trust because she would not take care of Stan and Kwok's children and would spend all the money on her daughters.

Kwok testified that Stan created the bypass trust to take care of their kids' expenses and insurance. She stated that Stan did not feel he needed to support his sister, but the bypass trust was there for emergencies for his nieces.

All of Stan's life insurance policy proceeds went to his mother, Lau. After Stan's funeral, Lau disinherited Stan's children. Kwok explained that she executed a disclaimer "for my children." When she discovered she was not receiving the life insurance proceeds, the children had been disinherited by their grandmother and the estate was facing about \$7 million in lawsuits she decided to disclaim some of the assets, so they would go the children.

She calculated there was \$2,209,240 remaining of the federal tax exemption so she disclaimed that amount to eliminate the bypass trust which relied on the tax exemption.

To date, none of the assets have been transferred from the separate property trust to the marital trust. Kwok segregated four properties to fund the transfer to the generation-skipping tax trust. Each property has its own bank account where income is deposited, and she has acted as a fiduciary.

Kwok testified that she disclaimed "certain amounts from [the] total value of Stan's assets. They are supposed to go to the marital trust. So this amount should be equal to the estate tax exemption." Kwok stated: "[A]ll I know is that I was disclaiming a value that [was] equal to the tax exemption. The total was about 2.2-million that I would split between my children's [generation-skipping tax] trust." She stated that she "disclaimed the values, . . . but not the particular properties."

Richard Kinyon was qualified as an expert on estate and trust planning and administration. Kinyon stated the two trusts (separate property trust and community property trust) must be read as though they were one instrument. He explained that

Kwok's disclaimer was intended to override the formula in the bypass trust and use the exemption. Kwok wanted her children to be the exclusive beneficiaries, not just the primary ones. Kinyon described Kwok's disclaimer as using a "pecuniary amount" equivalent to the amount of the estate-tax exemption. The related agreement provides how it will be funded, via the properties, for federal tax purposes. Kinyon stated that Kwok wanted to defund the bypass trust; her actions were intentional based on the events after Stan's death.

James Mitchell, the attorney who drafted the trust documents, testified that the disclaimer provision was standard. He did not recall specifically discussing the provisions with Stan. Mitchell testified that under the terms of the separate property trust, the marital trust gets the remaining assets after any specific gifts and the funding of the bypass trust. The marital trust is "subject to what is sheltered by the bypass trust, what is used up by specific gifts. It's affected by expenses, debt. It's essentially the residue after the first death. So it's the bucket that everything falls into, for lack of a better word."

Mitchell stated the children were intended to be the primary beneficiaries and Stan wanted to provide a "safety net" for the education needs of his nieces and medical expenses of his sister as necessary.

Jeanne's expert, John Hartog, testified as an expert in estate planning, probate and trust law. He agreed that Kwok disclaimed a pecuniary amount or dollar amount from the community property trust equal to the tax exemption. He said it was a valid qualified disclaimer. Hartog interpreted the disclaimer in the community property trust to be given effect after the funding of the bypass trust in the separate property trust.

C. Statement of Decision

The court issued a tentative statement of decision which was addressed by all parties and then the court held a hearing prior to issuing a final statement of decision.

In the final statement of decision, the court explained that Kwok, as trustee of the community property trust, requested Jeanne, as trustee of the separate property trust, to distribute assets from the separate property trust to the community property trust based on Kwok's disclaimer. Kwok filed a petition to compel distribution. The trial court stated the

trial presented one issue: was Kwok's disclaimer valid and should the court order distribution.

The trial court stated to derive Stan's intent "from the arcany of sophisticated trust instruments is frankly, a work of fiction." Both parties presented extensive extrinsic evidence to demonstrate Stan's intent. The court concluded Stan's primary intent was to provide for his two children because he made them the primary beneficiaries of the bypass trust.

The trial court concluded Kwok's disclaimer was valid, noting that even Jeanne's expert testified it was a "valid qualified disclaimer." The court found that Kwok disclaimed a pecuniary amount rather than the four specific San Francisco properties. The properties are not included in the disclaimer. Kwok testified that she segregated the properties but she "disclaimed the certain amounts on these funding agreements." The court found Jeanne's actions put the disclaimer in "legal limbo" making it difficult for Kwok to know how to proceed. The court granted Kwok's petition to compel distribution of assets from the separate property trust.

DISCUSSION

1. Kwok's Disclaimer of the Marital Trust Assets Was Valid and Enforceable.

Jeanne argues that Stan intended to provide for Kwok and his children through the marital trust and also provide for his children as well as his sister and nieces through his separate property trust. Thus, even if Kwok's disclaimer was valid under the trust documents, it was contrary to Stan's intent. The nieces argue that even if the form of the disclaimer is valid, the substance is not. Kwok counters that the disclaimer provision was part of their community property trust and she exercised it in such a way as to allow additional assets to pass to the children, which was Stan's primary intent in creating the estate plan.

A. *Standard of Review*

Jeanne argues that we should apply a de novo standard of review because the interpretation of a will or trust is a question of law. (*Burch v. George* (1994) 7 Cal.4th

246, 254.) Kwok argues that because the trial court was evaluating conflicting evidence, this court reviews for substantial evidence and whether the trial court's interpretation of the trust was reasonable.

Probate Code section 21102 provides: “(a) The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument. [¶] (b) The rules of construction in this part apply where the intention of the transferor is not indicated by the instrument. [¶] (c) Nothing in this section limits the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the intention of the transferor.” “A reviewing court may exercise its independent judgment in interpreting an instrument provided that extrinsic evidence regarding interpretation is not conflicting.” (*Estate of Guidotti* (2001) 90 Cal.App.4th 1403, 1406.) Where conflicting inferences may be drawn from the uncontroverted evidence, the reviewing court must exercise independent judgment to interpret a will. (*Ibid.*)

Here the trial court concluded that it was “a work of fiction” to attempt to discern Stan’s intent from trust documents that are “chockfull of legal jargon” and “boilerplate” provisions. The court found the “most we can hope to learn are Stan’s broad intentions, and those *are* knowable from the trust documents.” “Here testimony and documentary evidence were presented at trial. However, the statement of decision does not identify any conflicting extrinsic evidence as to the meaning of the Trust. Nor have the parties pointed to conflicting extrinsic evidence as to the interpretation of the Trust.” (*Ammerman v. Callender* (2016) 245 Cal.App.4th 1058, 1072-1073.) There was no evidence conflicting with the evidence that Stan’s primary goal was to provide for his children. Thus, we independently review the trial court’s decision here.

B. Disclaimer

The crux of Jeanne’s argument is even if Kwok’s disclaimer is valid, it was a “scheme” or “gimmick” to subvert Stan’s intent to provide for his nieces. However, even if we accept the premise that Kwok found a clever way to divert additional assets to her children, this does not necessarily render the disclaimer invalid. The effect of the disclaimer is to transfer the amount to the generation-skipping tax trust rather than allow

the funding of the bypass trust. While Stan's children were already the primary beneficiaries of the bypass trust, the disclaimer allows them to be the sole beneficiaries of the same amount.

Under the California Probate Code, a beneficiary may disclaim any interest by filing a disclaimer. (Prob. Code, § 275.) The disclaimer must be in writing and describe the interest to be disclaimed. (Prob. Code, § 278.) Under the Internal Revenue Code, the term "qualified disclaimer" means "an irrevocable and unqualified refusal by a person to accept an interest in property" that is prepared in writing within nine months of the transferor's death. (26 U.S.C. § 2518(b).)

Kwok argues that the language of the disclaimer provisions is unrestricted and provides no exception for the bypass trust. Kwok testified that Stan wanted her to have the "flexibility to disclaim and to be able to disclaim and get the control of all his assets." She said Stan's family's actions jeopardized their "children's benefit." Furthermore, Stan's children are listed as the primary beneficiaries of the bypass trust.

James Mitchell testified that the disclaimer provision, section 5.9, was "fairly standard." He did not recall discussing the provision with Stan or advising him that Kwok could defeat the bypass trust with a disclaimer. " " "In construing trust instruments, as in the construction and interpretation of all documents, the duty of the court is to first ascertain and then, if possible, give effect to the intent of the maker." ' ' ' (*Estate of Cairns* (2010) 188 Cal.App.4th 937, 944.) The parties presented conflicting evidence at trial about Stan's relationship with Kwok as well as his relationship with his nieces,² but all parties agreed that Stan's primary goal in his estate planning was to provide for his children. The trial court found that "Stan's paramount intention was that his young children be well cared for after he was gone." The children were "foremost in his mind" when he and Kwok drafted their trust documents. "Every witness asked about it – both

² The trial court noted "Jennifer and Jeanne clearly do not like each other, and the rancor had simmered even before Stan's death." Since Stan's death, Jeanne has had no relationship with his children, her niece and nephew.

sides – testified that Stan loved his children deeply and wanted them well cared for: *that* was Stan’s intent.”

Kwok’s use of the disclaimer benefited the children. The trial court found that although the nieces argued Kwok benefited from the disclaimer, Kwok “acted in the interests of Stan’s children, as was Stan’s intent.”

Jeanne relies on both the language of the separate property trust and the evidence at trial about Stan’s relationship with his nieces to argue Stan intended to provide for them and the disclaimer subverts Stan’s intent. For instance, Jeanne identifies section 5.11 of the separate property trust, which provides that the bypass trust remains in existence for the life of Jeanne and the nieces. In addition, Stan designated Jeanne as the trustee for the separate property trust.

The parties disagree about whether Kwok should have been allowed to use the disclaimer. Kwok testified that she exercised the disclaimer because Stan’s mother was the beneficiary of a \$1 million life insurance policy, Stan’s mother had disinherited Stan and Kwok’s children after his death, and she had brought a legal action against Stan’s estate.

Jeanne argues that Kwok should not be allowed to disclaim assets based on events that were unrelated to the trust such as Stan’s mother disinheriting the children or taking the life insurance proceeds. Jeanne cites to cases that explain that unforeseen circumstances cannot alter the construction of the language of a will. (*In re Bourn’s Estate* (1938) 25 Cal.App.2d 590, 597, disapproved on other ground in *In re Platt’s Estate* (1942) 21 Cal.2d 343, 346-348.) However, even accepting this premise as true, Kwok did not ask the trial court to interpret the trust documents in light of changed circumstances; the disclaimer language is contained in the community property trust itself. Kwok was simply making use of the disclaimer to her advantage. Given the disclaimer was part of the community property trust, Kwok was entitled to use it to the benefit of the children. This is not contrary to Stan’s intent.

C. *Order of the Trust Funding*

In a cursory argument in her opening brief, Jeanne asserts that under Stan's "order of distribution" the bypass trust was to be funded before any residuary transferred to the marital trust. If the "order of distribution" had been followed, the bypass trust would have used up the estate tax exemption, thereby leaving no assets to transfer to Kwok's marital trust.

The separate property trust directs that the trustee shall pay all Stan's debts. Then it directs the trustee to distribute Stan's Geary Boulevard property and Stan's stake in California Financial to the marital trust. Next, it directs the trustee to fund the bypass trust "with the largest fractional part of the trust estate (up to the whole thereof) that can pass free of federal estate tax." All remaining assets "shall be distributed to the trustee of the marital trust."

Section 4.2.1.2 of the separate property trust states that the bypass trust is funded with an amount that is free of federal estate tax "after taking into account all other property disposed of under other provisions of this agreement and property passing outside of this trust." Mitchell testified the marital trust gets the remaining assets after any specific gifts and after funding the bypass trust. The marital trust is "the bucket that everything falls into" after all the debts, expenses and gifts are paid.

Nothing in the trust documents makes a specific disposition of a disclaimed interest. Neither the trust nor the testimony at trial clarified whether the bypass trust is to be funded before or after the disclaimer takes effect.

Jeanne argues the estate documents set forth Stan's intent that Kwok get the marital deduction and the bypass trust get the estate tax exemption. The disclaimer provision in the community property trust cannot be used to defeat provisions in the separate property trust. But one expert testified that the two trusts must be read as if they were one instrument. And Jeanne agrees the disclaimer provision cannot be read in isolation and the separate property trust and community property trust must be construed together.

Jeanne cites to a letter sent from Mitchell to Stan and Kwok prior to Stan signing the separate property trust and community property trust that included flowcharts showing the distribution of assets. The letter explains that if Stan dies before Kwok, a bypass trust will be created to hold assets equal to Stan's remaining life exemption (\$3.5 million) and any assets in excess of the bypass trust will be distributed to the marital trust. "The beneficiaries of the bypass trust are your children, Stan's sister, Jeanne Kwong, and Jeanne's daughters. The trustee may distribute assets to any of these beneficiaries for their reasonable living needs. Upon Jeanne's death (or if Jeanne does not survive Stan), the remaining assets will be divided into equal shares for your children."

The parties provide no case authority on this issue. The Supreme Court of Montana addressed an analogous situation in *Estate of McClure* (2016) 385 Mont. 130 [381 P.3d 566]. In *McClure*, Jack and Dixie McClure created a trust agreement that provided upon either of their deaths, the trust estate would be divided into a survivor's trust and a decedent's trust. (*Id.* at pp. 568-569.) The decedent's trust " 'shall consist of assets equal in value to the maximum amount, if any, that can pass free of federal estate tax.' " (*Id.* at p. 569.) After Dixie's death, Jack did not divide the trust assets and continued to accumulate assets. Two years later, Jack married Ellie and amended the trust to state that she was the sole beneficiary for her lifetime of the trust and upon her death, it would be distributed to Jack's children. (*Ibid.*) The Montana Supreme Court stated that the trust could be interpreted to require the decedent's trust to be funded up to the maximum amount of the unified tax credit and such an interpretation would result in no assets being allocated to the survivor's trust. (*Id.* at p. 572.) But such an interpretation conflicted with the language in other sections of the trust and with Jack and Dixie's intent in creating the trust. (*Ibid.*) The court considered not only the trust document itself but other documents to give effect to Jack and Dixie's intent and concluded the survivor's trust should be funded. (*Id.* at pp. 572-573.)

Here, there is no language in the trust documents that conflicts with Kwok's use of the disclaimer and the trial court found it was not contrary to Stan's intent. Stan's overarching intent was to provide for his children and Kwok's use of the disclaimer

benefits the children. Further, Kwok testified they intended the disclaimer power to allow her flexibility and to create a safeguard. She elected to use this power after Lau collected on Stan's life insurance policy, Lau disinherited the children, and Kwok faced substantial losses to the marital trust due to litigation.

Kwok argues that the subordination clause renders the bypass trust secondary to the disclaimer power. Any gifts that use the estate tax exemption must be taken into account before funding the bypass trust. The separate property trust section 4.2.1.1 states: "The trustee shall fund the 'bypass trust' with the largest fractional part of the trust estate (up to the whole thereof) that can pass free of federal estate tax." Kwok's disclaimer effectively uses the federal estate tax exemption, leaving no funds that can pass "free" of the tax to fund the bypass trust.

This is further supported by Probate Code section 282 which requires a valid disclaimer to relate back to the date of death. A disclaimed interest shall be distributed or held "as if the disclaimant had predeceased the creator of the interest." (Prob. Code, § 282, subd. (a).)

D. *Kwok's Retention of the Disclaimed Assets*

Jeanne argues that because Kwok retained ownership of the disclaimed assets and failed to transfer them to the generation-skipping tax trust, she has failed to disclaim them.

The parties disagree about whether Kwok disclaimed specific properties or a pecuniary amount, not specific assets. At trial Kwok testified that she segregated the properties but she disclaimed a monetary value, not particular properties.

Jeanne argues that because Kwok attached an agreement to the disclaimer that listed the four properties as the assets she elected to disclaim, she was disclaiming the properties. Exhibit 1 to the agreement does list all of the assets and included a total of the disclaimed portion of \$2,203,095. However, the trial court concluded: "The properties and accounts are nowhere mentioned in Jennifer's disclaimer; rather a 'pecuniary amount' was disclaimed. The houses and accounts were assets segregated to fund the disclaimed pecuniary amount." (See *Estate of Cairns*, *supra*, 188 Cal.App.4th at p. 947

[“The provision uses the terms ‘pay’ and ‘amounts,’ but does not state that the amounts must be paid in cash. We will not interpret the words ‘pay’ and ‘amounts’ in a technical or limited sense where to do so conflicts with the efficient management of the Trust.”].)

The trial court found Kwok disclaimed a pecuniary amount, not specific properties. It stated, “a disclaimer of a pecuniary amount using a formula is valid,” citing to 26 Code of Federal Regulations section 25.2518-3(c)-(d). The trial court noted that even Jeanne’s expert testified that Kwok provided a “valid qualified disclaimer.” We agree.

Next, Jeanne argues that Kwok listed the four properties on loan applications to the Bank of the Orient five times over the past five years. Thus, Kwok accepted benefits from her ownership of the four properties. Under Probate Code section 285, subdivision (b)(3), a beneficiary accepts an interest if the beneficiary accepts a benefit.

In *Cassel v. Kolb (In re Kolb)* (9th Cir. 2003) 326 F.3d 1030, a bankruptcy case, Kolb’s father created a trust for the benefit of Kolb’s mother. The father’s will provided that upon the mother’s death the remainder of the trust would go to Kolb and his two siblings. (*Id.* at pp. 1033-1034.) In applying for a loan, Kolb listed his future beneficial interest in the Kolb trust in financial statements. In anticipation of filing for bankruptcy, Kolb disclaimed his interest in the Kolb trust and one of his creditors challenged the disclaimer. (*Id.* at p. 1034.) The creditor argued that Kolb had accepted his future interest in the Kolb trust by listing the interest on a loan application. (*Id.* at p. 1040.) The Ninth Circuit Court agreed, explaining that Kolb’s use of his future interest in the Kolb trust to secure a personal loan “ ‘greatly increased Kolb’s net worth and also increased the likelihood that his loan would be approved.’ ” (*Ibid.*) The Ninth Circuit Court held “the California legislature intended to prohibit the disclaimer of an interest accepted through conduct by a beneficiary implying an intent to direct or control the property in a manner that conveys more than a *de minimis* benefit to the beneficiary or a third party.” (*Id.* at p. 1039.)

Here, the loan from Bank of the Orient did not greatly increase Kwok’s net worth and there was no evidence that listing the properties on the loan application had increased

the likelihood the loan would be approved. Kwok contends that she provided “generic and non-specific” information on the loan applications and they were not a significant factor in California Financial being given the loan. The loan, a \$1.2 million line of credit, was not a significant amount compared to Kwok and California Financial’s extensive holdings. While the better practice would have been for Kwok to clarify with the bank that the four properties were segregated to be transferred to the generation-skipping tax trust, there is simply no evidence in the record to verify whether listing the four additional properties had any impact on the loan.

Next, Jeanne argues Kwok’s disclaimer was not effective because she failed to convey the segregated properties. Under the California Probate Code: “A disclaimer may not be made after the beneficiary has accepted the interest sought to be disclaimed.” (Prob. Code, § 285, subd. (a).)

Jeanne argues that from the time of Stan’s death, Kwok treated the four properties as hers. The properties themselves or the equivalent amount has never been transferred to the generation-skipping tax trust. Kwok retains title as the trustee of the community property trust.

Kwok counters that the IRS only requires evidence of assets sufficient to cover the disclaimed amount; it does not require the specific assets themselves. The Internal Revenue regulations provide: “A disclaimer of a specific pecuniary amount out of a pecuniary or nonpecuniary bequest or gift which satisfies the other requirements of a qualified disclaimer under section 2518(b) [citation] and the corresponding regulations is a qualified disclaimer provided that no income or other benefit of the disclaimed amount inures to the benefit of the disclaimant either prior to or subsequent to the disclaimer.” (26 C.F.R. § 25.2518-3(c).) Any amount disclaimed must be segregated from the portion of the gift that is not disclaimed. (*Ibid.*)

Further, “[a] qualified disclaimer cannot be made with respect to an interest in property if the disclaimant has accepted the interest or any of its benefits, expressly or impliedly, prior to making the disclaimer. Acceptance is manifested by an affirmative act which is consistent with ownership of the interest in property.” (26 C.F.R. § 25.2518-

2(d)(1).) An exception is provided for fiduciaries: “If a beneficiary who disclaims an interest in property is also a fiduciary, actions taken by such person in the exercise of fiduciary powers to preserve or maintain the disclaimed property shall not be treated as an acceptance of such property or any of its benefits.” (26 C.F.R. § 25.2518-2(d)(2).)

Kwok testified she segregated the properties, but did not transfer the disclaimed assets to the generation-skipping tax trust because there were so many “uncertainties” and the assets had not been transferred from the separate property trust. She did not expect the litigation about the disclaimer to take five years.

The trial court found Kwok’s actions were reasonable given the fact Jeanne refused to acknowledge the disclaimer and Kwok needed to continue running California Financial. The trial court found that Kwok was under a duty to convey title to the generation-skipping tax trust as soon as “practicable” but given the circumstances, she was excused from doing it immediately. The court stated: “What was Jennifer to do? Her husband recently died. She was now running the family business on her own. Her sister-in-law was refusing to acknowledge her disclaimer, casting it into legal limbo. How were the four properties’ accounts to be addressed on tax returns, loan applications and the like? Jeanne’s gotcha scenarios—such as they are—resulted from her own litigation conduct.”

Jeanne’s next argument is Kwok received a benefit by keeping the properties because none of them were reassessed as would be required when they are transferred to the children. Kwok presented testimony from certified public accountant Dennis Fong that she received no tax benefits from maintaining the four properties and, in fact, she incurred additional taxes for them. Fong testified there was no tax benefit from listing the four properties on her 2009 tax return. The cash flow from the four properties was “neutral” in that it did not add to the value of California Financial.

Finally, both Jeanne and the nieces argue the disclaimer is illusory. Jeanne contends that because the marital trust receives assets of the exact same value as those that were disclaimed, any disclaimer is illusory. The nieces argue that when a disclaimer does not change the amount taken by the beneficiary, it is not a valid disclaimer.

“One who disclaims an interest in property must do so without getting something in exchange; and since property has been given up, it follows that a ‘qualified disclaimer’ would be one in which the renunciation is not complete because property has been kept or received in return.” (*Estate of Monroe v. Commissioner* (5th Cir. 1997) 124 F.3d 699, 709.)

The nieces further argue that Kwok received the benefit of the disclaimed amount which renders the disclaimer invalid. They rely on *Estate of Sagal* (1979) 89 Cal.App.3d 1003, where the beneficiaries planned a “renunciation scheme” to avoid paying estate taxes. The court held a disclaimer may not be made after the beneficiary has accepted the interest to be disclaimed citing to Probate Code former section 190.7 (now section 285, subdivision (b)(3)). (*Sagal*, p. 1014.) The situation here is not analogous to *Estate of Sagal* because Kwok executed a valid disclaimer that used the federal estate tax exemption to the benefit of *her children*.

The nieces cite to *Estate of Nicely* (1965) 235 Cal.App.2d 174, where the court held a beneficiary could not renounce part of the trust in order to evade the trust’s restrictions. “[T]o renounce a trust only to effect transfer of its moneys into the intestate portion of an estate is quite another matter. That is not a renunciation; it is only an evasion of the trust’s restrictions. And a rule permitting such manipulation would have monstrous implications.” (*Id.* at p. 182; see also *Estate of Aylsworth* (1966) 74 Ill.App.2d 375 [219 N.E.2d 779] [applying the Illinois Disclaimer Act to conclude a “fake” disclaimer made by agreement of the parties as an attempt to break the trust was not a valid disclaimer].)

Here the disclaimer was part of the community property trust that Stan and Kwok created for their estate. Kwok utilized the disclaimer in order for Stan’s assets in the separate property trust to go to her children in the generation-skipping tax trust. This was not an evasion of any trust restriction and it did not subvert Stan’s intent that his children be the primary beneficiaries of his estate.

DISPOSITION

The judgment is affirmed.

LEE, J.*

We concur:

STREETER, Acting P.J.
TUCHER, J.

* Judge of the Superior Court of California, County of San Mateo, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.